

2023 SCC OnLine Mad 6973 : (2023) 2 Writ LR 649

In the High Court of Madras

(BEFORE SANJAY V. GANGAPURWALA, C.J. AND P.D. AUDIKESAVALU, J.)

W.P. No. 13203 of 2023

All India Gaming Federation, Rep. by its General  
Secretary and Authorised Signatory, Sunil  
Krishnamurthy ... Petitioner;

*Versus*

State of Tamil Nadu Through Chief Secretary and  
Others ... Respondents.

With

W.P. No. 13593 of 2023

Gameskraft Technologies Private Limited and  
Another ... Petitioners;

*Versus*

State of Tamil Nadu Through Secretary to  
Government Law Department ... Respondent.

With

W.P. No. 13720 of 2023

Play Games 24 × 7 Private Limited, Rep. by its  
Authorised Representative, Sameer Chugh and  
Another ... Petitioners;

*Versus*

State of Tamil Nadu Through Chief Secretary and  
Others ... Respondents.

With

W.P. No. 13722 of 2023

Head Digital Works Private Limited, Through its  
Authorized Representative, Aayush Raj and  
Another ... Petitioners;

*Versus*

State of Tamil Nadu Through Chief Secretary and  
Others ... Respondents.

And

W.P. No. 14704 of 2023

Junglee Games India private Limited and Another ...  
Petitioners;

*Versus*

State of Tamil Nadu Through Chief Secretary and  
Others ... Respondents.

W.P. Nos. 13203, 13593, 13720, 13722 and 14704 of 2023

Decided on November 9, 2023

Advocates who appeared in this case :

For the Petitioner in W.P. No. 13203 of 2023 : Mr. Sajan Poovaiya,  
Senior Counsel;

Mr. V. Ragavachari, Senior Counsel;

Ms. Deepika Mulari, Mr. Pradeep Nayak, Mr. Samkeeth Vittal, Mr.  
Pratiks Bhadri Narayan S., Ms. Shreya Narayanan

For the Petitioners in W.P. No. 13593 of 2023 : Dr. Abhishek Manu  
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Mr. Nikhil Parikshith

Mr. Abhishek Manchanda

Mr. Sayandeep Pahari

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For the Petitioners in W.P. No. 13720 of 2023 : Mr. C. Manishankar,  
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For the Petitioners in W.P. No. 13722 of 2023 : Mr. Satish Parasaran,  
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For the Petitioners in W.P. No. 14704 of 2023 : Mr. Mukul Rohatgi,  
Senior Counsel for Mr. R.S. Diwagar

Mr. Akhil Anand

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Mr. Bharadwaj Ramasubramanian

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For the 1<sup>st</sup> Respondent in W.P. Nos. 13203, 13720, 13722 & 14704  
of 2023 : Mr. Kapil Sibal, Senior Counsel assisted by Ms. Aparajita  
Jamwal

For the 2<sup>nd</sup> Respondent in W.P. Nos. 13203, 13720, 13722 & 14704  
of 2023 and for the sole Respondent in W.P. No. 13593 of 2023 : Mr. R.  
Shunmugasundaram Advocate General assisted by Mr. P. Muthukumar  
State Government Pleader, Ms. A.G. Shakeena and Mr. B. Thiyagarajan

For the 3<sup>rd</sup> Respondent in W.P. Nos. 13203, 13720, 13722 & 14704  
of 2023 : Mr. Amit Anand Tiwari Additional Advocate General, Supreme  
Court assisted by Ms. Devyani Gupta and Mr. Amartya A. Sharan

For the 4<sup>th</sup> Respondent in W.P. Nos. 13203, 13720, 13722 & 14704

of 2023 : Mr. P. Muthukumar State Government Pleader assisted by Mrs. R. Anitha Special Government Pleader; Mr. K.M.D. Muhilan Additional Government Pleader and Mr. K. Karthik Jagannath Government Advocate

PRAYER IN W.P. No. 13203 of 2023: Petition under Article 226 of the Constitution of India seeking a writ of declaration to declare the Impugned Act being Tamil Nadu prohibition of Online Gambling and Regulation of Online Games Act, 2022 enacted by the first respondent as unconstitutional as the same is lacking legislative competence and/or being in violation of Constitution of India including the fundamental rights enshrined under Articles 14, 19 and 21.

PRAYER IN W.P. No. 13593 of 2023: Petition under Article 226 of the Constitution of India seeking a writ of declaration declaring that the Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Act, 2022 (Act No. 9 of 2023) is ultra vires the Constitution of India.

PRAYER IN W.P. No. 13720 of 2023: Petition under Article 226 of the Constitution of India seeking a writ of declaration declaring Sections 2 (i) read with Sections 7, 8, 9, 10, 23 and the Schedule contained in Act No. 9 of 2023 dated April 7, 2023 as arbitrary, void, illegal, and unconstitutional, in so far as the same applies to Rummy and Poker when played online with money or other stakes.

PRAYER IN W.P. No. 13722 of 2023: Petition under Article 226 of the Constitution of India seeking a writ of declaration declaring Sections 2 (i) read with Section 7, 8, 9, 10, 23 and the Schedule contain in Act No. 9 of 2023 dated April 07, 2023 as arbitrary, void, illegal, and unconstitutional, in so far as the same applies to Rummy and Poker when played online with money or other stakes.

PRAYER IN W.P. No. 14704 of 2023: Petition under Article 226 of the Constitution of India seeking a writ of declaration declaring Sections 2 (i) read with sections 7, 8, 9, 10, 23 and the schedule contained in Act No. 9 of 2023 dated April 7, 2023, Tamil Nadu prohibition of online Gambling and Regulation of online Games Act, 2022 as arbitrary, void, illegal, and unconstitutional, in so far as the same applies to rummy and poker when played online with money or other stakes.

The Order of the Court was delivered by

SANJAY V. GANGAPURWALA, C.J.:— All these writ petitions involve common question of law and are based on similar set of facts. To avoid rigmarole, they are decided by this common judgment.

2. The petitioners assail the constitutional validity of the Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Act, 2022 [for brevity, hereinafter referred to as the “Act of 2022” or “the impugned Act”].

3. The petitioner in W.P. No. 13203 of 2023 is a Society registered under the Societies Registration Act, 1860. It claims to have been established with the objective of protecting consumers of online skill gaming and representing the interests of various online skill gaming Companies, including online skill gaming Companies offering skill-based games/platforms at various forums. The Members of the petitioner Society offer games such as poker, chess, rummy, fantasy sports, casual games and e-sports.

4. The petitioner in W.P. No. 14704 of 2023 claims to be a Company engaged in the business of developing and offering online games of skill and other free games in India and abroad. The petitioner is currently engaged only in the business of designing, developing software relating to games of skill, deploying and maintaining an online gaming website and mobile applications based on games of skill for the Indian market.

5. The petitioner in W.P. No. 13593 of 2023 is a Company incorporated under the Companies Act, 2013. It is in the business of operating online gaming platforms offering the game of rummy to its users across India, through its website/mobile based applications called "Rummymculture", "Gamezy" and "Playship", which comprises of money based and free variants of the game rummy.

6. The first petitioner in W.P. No. 13722 of 2023 claims to be a Company registered under the Companies Act, 2013 and engaged in the business of developing and offering online games of skill in India. The petitioner contends that it is involved in the business of designing, developing software related to games of skill, deploying and maintaining an online gaming website and mobile applications based on games of skill for the Indian market via the internet.

7. The first petitioner Company in W.P. No. 13720 of 2023 is a private limited Company providing online web and mobile based platforms and offering competitive games of rummy in three popular formats of tournaments, points rummy and pool rummy.

8. Dr. Abhishek Manu Singhvi, learned Senior Counsel for the petitioners in W.P. No. 13593 of 2023; Mr. Mukul Rohatgi, learned Senior Counsel for the petitioners in W.P. No. 14704 of 2023; Mr. Sajan Poovaiya and Mr. V. Ragavachari, learned Senior Counsel for the petitioner in W.P. No. 13203 of 2023; Mr. C. Manishankar, learned Senior Counsel for the petitioners in W.P. No. 13720 of 2023; Mr. Satish Parasaran, learned Senior Counsel for the petitioners in W.P. No. 13722 of 2023, put forth the case of the petitioners. The contour of their submissions can be summed up as under:

9. The impugned Act is solely based on the report submitted by the Committee under the Chairmanship of Justice K. Chandru (Retd.). The said report has arbitrarily categorised games of skill, i.e., online rummy

and online poker, to be games of chance. The said report is directly in the teeth of the law settled by the Division Bench of this Court in the case of *Junglee Games India Private Limited v. State of Tamil Nadu*<sup>1</sup>, and that of the Apex Court in a catena of judgments. The report fails to substantiate its own findings or the alleged impact of online games. The said report was not made available on the public domain, however, the same was filed by the State of Andhra Pradesh before the Andhra Pradesh High Court in *W.P. No. 19659 of 2020*. The said Committee did not have a single expert on online games or a representative from the industry as a Member of the Committee.

10. The terms of reference of the said Committee show that the whole intent was predetermined, that is to ban online games of rummy and poker, despite being a legally permissible business activity and protected under Article 19(1)(g) of the Constitution of India. A perusal of the title of the report, i.e., "*Report of the Committee to recommend the desirability of a legislation to ban online card games including Rummy*" shows that the Committee was formed to submit a report, which is pre-decided, on prohibiting online rummy by classifying the same as gambling/game of chance.

11. The Committee met only on two occasions, i.e., on 13.06.2022 and on 16.06.2022, to discuss the notes of the Committee Members, which itself seems to have been put together within a short period of time. The said report arbitrarily, incorrectly and unjustifiably equated skill games, when played online for money, to gambling and betting. The said report refers to the findings of the law laid down by the Apex Court and followed by the Division Bench of this Court, as well as the Karnataka High Court and Kerala High Court. The report summarises the findings of the High Court judgments correctly, that is, "*Skill gaming cannot be banned but may be regulated. Any such ban can be challenged on the grounds of violation of Constitutional Rights*". The report bifurcates playing online rummy into two activities, "playing" and "betting". The same is without any logical reasoning and is completely contrary to the rulings of the Apex Court, this Court and the other High Courts.

12. The Committee has not appreciated the functioning of online rummy, especially the limited role of the Random Number Generator (RNG) Software. The report further incorrectly alleges that the game can be manipulated by the use of bots (short for Robots), however, failed to consider that no bots are employed. The report erroneously distinguishes and concludes that there is a vast difference between rummy and poker when played physically and online. The said report further erroneously suggests that online gaming portals utilize digital currency. However, it has been clarified that the petitioners do not accept any digital currency on its platform. Money is accepted only

through legally recognized banking channels like net banking, debit cards, wallets, UPIs etc.

13. The said report refers to the 246<sup>th</sup> Law Commission Report, but conveniently ignores Section 3 of the Law Commission Report, wherein it has been held that the games of skill are not gambling activity. The report cannot be placed on a higher pedestal. It does not have appropriate value. The said report suggests that suicides are committed by students, but no empirical data exists in that regard. Suicides are unfortunate, however, it is in no way substantiated that the same are because of the online games.

14. Section 2(i) of the Act of 2022 defines “online gambling” to include wagering or betting. Section 7(1) of the Act of 2022 prohibits online gambling. Section 10(5)(a) and Section 14(1)(a) of the Act of 2022 restrain local and non-local online games providers from providing online gambling services. These provisions, which form the bedrock of the Act of 2022, are contrary to the dictum of the Supreme Court and *ultra vires* the competence of the respondent State.

15. The Government of India, vide notification dated 23.12.2022, has amended the allocation of Business Rules and designated the Ministry of Electronics and Information Technology as the nodal Ministry for regulation of online games. Entry 31 read with Entry 14, List I (Union List) of the VII Schedule of the Constitution of India deals with posts, telegraphs, telephones, wireless, broadcasting and other like forms of communication. The same is a Union Subject and the State of Tamil Nadu has no power to legislate with regard to the same.

16. The Ministry of Electronics and Information Technology has issued the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 [for brevity, herein after referred to as “the I.T. Amendment Rules”]. The I.T. Amendment Rules recognises the term “online gaming intermediary” and defines it as an intermediary, which enables the users of its computer resource to give access to online games. The I.T. Amendment Rules have placed the online gaming intermediary at par with the “significant social media intermediary”. The online gaming intermediary, under the I.T. Amendment Rules, has stringent compliance requirements.

17. The Ministry of Electronics and Information Technology has filed a memo stating that three applications have been received for formation of a Self Regulatory Body. The petitioners, along with the other online gaming Companies, have already incorporated a Company under Section 8 of the Companies Act, 2013 for the purpose of formation of a Self Regulatory Body.

18. The State does not possess the legislative competence to enact the impugned Act. Legislature under Entry 34, List II (State List) of

Schedule VII of the Constitution of India can legislate on "betting and gambling". This Entry includes only games of chance and not games of skill. Any game, wherein there is predominance of skill over chance, would fall outside the ambit of "betting and gambling" and cannot be legislated upon by the respondent State.

19. The competitions which involve substantial skill are not gambling activities. Reliance is placed on a judgment of the Apex Court in the case of *K.R. Lakshmanan v. State of Tamil Nadu*<sup>2</sup>, wherein after analysing the earlier Constitutional Bench judgments in *The State of Bombay v. R.M.D. Chamarbaugwala*<sup>3</sup>, and *R.M.D. Chamarbaugwala v. Union of India*<sup>4</sup>, it was observed that gaming means the act or practice of gambling on a game of chance, where chance is the controlling factor. Reliance is also placed on the judgment of the Karnataka High Court in the case of *All India Gaming Federation v. State of Karnataka*<sup>5</sup>.

20. Reliance by the State on the judgment of the Apex Court in the case of *M.J. Sivani v. State of Karnataka*<sup>6</sup>, is misplaced. The said judgment is with regard to rigging of video game machine at video game parlour, which is very distinct from the online games offered by the petitioners. Further, it is stated by the State that this Court has not dealt with the judgment in *M.J. Sivani case* while delivering the judgment in the case of *Junglee Games* (supra). However, this Court has specifically referred to the case of *M.J. Sivani* (supra) in *Junglee Games* (supra).

21. Reliance by the State on the last four lines of the judgment of the Apex Court in the case of *State of Andhra Pradesh v. K. Satyanarayana*<sup>7</sup>, is misplaced. The judgment in *Satyanarayana's case* is clarified by a Three Judge Bench of the Apex Court in the case of *K.R. Lakshmanan* (supra) that the clubs have the right to make profits in conducting a game of skill. A Larger Bench of the Apex Court has clarified the position taken in the last four lines of *Satyanarayana's case*.

22. The game of Poker is also a game of skill. The same is observed by this Court in the case of *Junglee Games* (supra) and so also in the judgments of the Karnataka High Court and of the Kerala High Court. The 276<sup>th</sup> Law Commission of India report, titled "*Legal Framework : Gambling and Sports Betting including Cricket in India*" at paragraphs 3.34 and 3.35 has recognised Poker as a game of skill, since skilful players always win over less skilled or novice players. Even in the case of *U.S.A. v. Lawrence Di Cristina*<sup>8</sup>, the United States District Court for the Eastern District of New York, on facts, accepted that Poker is a game of skill. Though the finding was reversed in an appeal, the finding that Poker is a game of skill was left undisturbed, as the Appellate



Court noticed that the question of whether “skill” or “chance” predominates in Poker is inapposite to the appeal. The Supreme Court of Israel in the case of *Amit Amishvilli Rafi v. Assessing Officer*<sup>2</sup>, has also held that Poker is a game of skill.

23. The judgment of the learned Single Judge of the Gujarat High Court in the case of *Dominance Games Pvt. Ltd. v. State of Gujarat*<sup>10</sup> is erroneous, as the conclusion is based on the fact that the initial distribution of cards in the game is not within the control of the player. The Gujarat High Court has failed to consider that other card games, including rummy and bridge, also include initial distribution of cards and are held to be games of skill by the Apex Court in the case of *K. Satyanarayana* (supra). The Gujarat High Court relied upon the judgment in the case of *R v. Kelly* from the Courts of Appeal in the United Kingdom and the same is of no avail, as it was based on the law fully applicable to the United Kingdom and they do not follow the predominance test. More over, whether online poker is permissible or not falls within the jurisdiction of the Self Regulatory Body, notified by the Ministry of Electronics and Information Technology.

24. It is the further submission that games of skill do not cease to be one even when played with stakes. The Kerala High Court in the case of *Head Digital Networks Pvt. Ltd. v. State of Kerala*<sup>11</sup> has held that playing games of skill for stakes does not amount to gambling. There is no concept of an independent category of “betting” on games of skill. All “betting”, sought to be got in the ambit of “betting and gambling”, is betting on games of chance. Reliance is placed on the judgment of the Apex Court in the case of *Dr. K.R. Lakshmanan* (supra) and the judgment of this Court in the case of *Junglee Games* (supra).

25. The word “betting” cannot be segregated from “gambling” in order to create an alternate field of regulation by the respondent State. The State can only legislate on betting pertaining to gambling, *inter alia*, betting only on games of chance. Reliance is placed on a judgment of the Division Bench of this Court in *Junglee Games* (supra).

26. The words “betting and gambling” cannot be read as “betting or gambling”. When the provision is clear and unambiguous, the word “or” cannot be read as “and”, the word “and” cannot be read as “or”.

27. The games of online rummy and poker are no different from playing physical rummy or poker, other than the fact that the game is conducted and played virtually on a platform. The game *per se* is the same rummy game or the same poker game as in physical format. The State purports unreasonable classification and creates an artificial distinction between online and offline rummy. The State has failed to place any material or evidence on record to justify the difference in playing rummy physically or in online mode and the said classification



is in utter violation of Article 14 of the Constitution of India.

28. The State cannot raise its power to Entry 1 in the State List, which relates to public order. Public order is synonymous with public peace, safety and tranquillity. For public order to be disturbed, there must in turn be public disorder. Contravention of law can be said to affect public order, for that, it must affect the community or the public at large. The State has not placed any material on record to show any public order concerns arising out of online games of skill. The game of skill is played indoors and is not a demonstration/procession in public street, where public order could be disturbed. Reliance is placed on the judgment of the Apex Court in the case of *Ram Manohar Lohia v. State of Bihar*<sup>12</sup>. The Karnataka High Court in the case of *All India Gaming Federation* (supra) has observed that the State cannot exercise its powers to restrict games of skill to Entry 1 in the State List.

29. Entry 6 in the State List provides for public health and sanitation, hospitals and dispensaries. The same cannot be relied on by the State. The impugned Act is no way relatable to this Entry. The alleged deleterious effect of online gaming cannot be the basis of holding that the State can legislate on it based on public health.

30. The impugned Act is against the Constitution of India. The State has enacted the impugned Act to override the findings of this Court in the case of *Junglee Games* (supra). The impugned Act creates a charade, that is to suggest prohibition of gambling and to regulate games of skill, but it actually bans games which are held to be games of skill by various Courts, including this Court. The State cannot even regulate online gaming of skill under the State List, as this sector is already regulated by the Ministry of Electronics and Information Technology, being the nodal Ministry for regulation of games on the Indian internet. The impugned Act is not a validating Act. The judgment of this Court in the case of *Junglee Rummy* (supra) is binding on the State and no law under Entry 34 in the State List can be enacted to prohibit games of skill.

31. The State's reliance on the screenshots of the petitioners to suggest that the petitioners' incentives to the players is to gain profits is incorrect. Every business runs legitimate promotions and schemes to expand their business to ultimately make the business profitable. Any activity protected under Article 19(1)(g) of the Constitution of India is for the purpose of gaining profits and permitted activity and earning profit out of it and paying applicable taxes in compliance with law. If the State's argument is to be accepted, then all business activities, making profits, ought to be prohibited. This necessarily implies that if the petitioners were running at a loss, then the State would have no objection to the business activities of the petitioners. The petitioners do not profit from the winnings of the players. but charge a predetermined

service charge from the players playing the game.

32. The petitioners, being Companies, the writ petitions are maintainable. In fact, the shareholders have been arrayed as parties to the writ petitions. Reliance is placed on the judgments of the Apex Court in the cases of *R.C. Cooper v. Union of India*<sup>13</sup>, *Bennett Coleman & Co. v. Union of India*<sup>14</sup>, and *Western Coalfields Ltd. v. Special Area Development Authority, Korba*<sup>15</sup>.

33. The petitioners herein offer platforms to play games of skill (online rummy and poker) with real money to only those who are above the age of eighteen years. The players, who register on the platform and play real money games, are subjected to Know Your Customer/Client (KYC) process.

34. A player's wallet is linked to a Bank account and at the end of the game, the winner gets the entire winning amount in their Bank accounts, minus the predetermined service charge/platform fee, which is deducted by the petitioners from the total player's pot depending on the game and the stake. In the event the player wants to close the account, the amounts are sent back to the same source from where the money was deposited by the player. Further, Goods and Services Tax (GST) forms a part of the service fee and is paid by the petitioners to the Government in compliance with the applicable law.

35. The petitioners do not employ bots or use Artificial Intelligence (AI). The State has failed to substantiate their allegation against the petitioners of employing bots or the alleged use of AI. The same are bald allegations. The petitioners' platforms do not deploy AI or bots for the game play. The petitioners have already placed on record a certificate issued by an independent globally renowned I.T. Audit Agency (iTech Labs, Australia), certifying that there is no usage of bots in the game play. The said agency has been accepted by Governments of several Countries. The State of Tamil Nadu is at liberty to assess the same by using or deputing an independent Agency of repute of its choice. Online rummy or poker is played between two or more human beings only.

36. Mr. Kapil Sibal, learned Senior Counsel, Mr. R. Shunmugasundaram, learned Advocate General of the State of Tamil Nadu, Mr. Amit Anand Tiwari, learned Additional Advocate General of Tamil Nadu (Supreme Court) and Mr. P. Muthukumar, learned State Government Pleader canvassed their submissions on behalf of the State of Tamil Nadu (respondents).

37. The Preamble of the Act of 2022 establishes the societal concerns, which need to be addressed with reference to betting and gambling and its impact on the family and its societal impact. The Government of Tamil Nadu constituted a Committee. chaired by Justice

K. Chandru (retd.). The Committee comprised five Members. The Committee incorporated experts from the fields of law, psychiatry and technology to understand the legal and social implications of online games. The allegations of bias as against the Committee are misguided and bereft of merits. The terms of reference of the Committee were wide and open, including the determination of whether online games involve skill and to study the algorithm and its susceptibility of being tweaked.

38. The provisions of the impugned Act are traceable to the matters enumerated in the Entries 1, 6 and 34 in the State List. The impugned Act is also referable to the subject of "Criminal Law" under Entry 1, List III (Concurrent List) of the VII Schedule of the Constitution of India.

39. Entry 34 in the State List relates to "betting and gambling" and enables the State Legislature to make laws on "betting" and "gambling", or both. There is no legal impediment preventing the State from making a Law on the subject of "betting" *per se*, including "betting" on games of skill, pursuant to Entry 34 in the State List and the enactment of a Law, regulating "betting" on games of skill, is not contrary to any binding judicial decisions. The judgment of this Court in *Junglee Games* (supra) is *per incuriam* to the extent that it holds that betting in Entry 34 in the State List cannot be divorced from gambling and treated as an additional field for the State to legislate on, apart from the "betting" involved in gambling.

40. The Apex Court has held that the Entries in the Lists in the VII Schedule of the Constitution of India must be given wide interpretation in furtherance of the presumption of constitutional validity. Reliance is placed on the judgment of the Apex Court in the case of *Elel Hotels & Investments Ltd. v. Union of India*<sup>16</sup>. The restrictive interpretation adopted by this Court in the case of *Junglee Games* (supra) ignores this interpretive canon and is *per incuriam*.

41. No repugnancy has resulted due to the amendment of the Intermediary Guidelines by the Ministry of Electronics and Information Technology notification dated 06.04.2023. Rule 2(1)(qd) of the I.T. Amendment Rules defines "online real money game" as where a user makes a deposit in cash or kind with the expectation of earning winnings on that deposit. The said provision includes explanation, which explains "winning" as any prize, in cash or kind, which is distributed or intended to be distributed to a user of the online game based on the performance of the user and in accordance with the Rules of such online game. Therefore, "online real money games" are online games where the earnings of the player are contingent on his performance, that is skill, with no reference to any game of chance or gambling. The I.T. Amendment Rules themselves provide that when an

online gaming intermediary hosts any online games which violate the impugned Act, such conduct would be a breach of due diligence under the I.T. Amendment Rules.

42. Further, Section 15 of the impugned Act takes into account the issue of legislative competence with regard to internet communication. The enforcement of the prohibition and regulation on online gambling service providers is not abrogated by the State, instead, the enforcement mechanism consists of a provision enabling the Online Gaming Authority to make a recommendation to the State Government, which in turn would merely request the Central Government to exercise its powers under Section 69-A of the Information Technology Act, 2000 in respect of offending gambling service. In any event, under Article 246(3) of the Constitution of India, the Tamil Nadu Legislature has exclusive competence to make laws on the subjects mentioned in the State List. The matter of “betting and gambling” is enumerated in Entry 34 in the State List, and as such, the State of Tamil Nadu has an exclusive jurisdiction in respect of the same.

43. It is the Ministry of Electronics and Information Technology notification, amending the Intermediary Guidelines, which is invalid for lack of legislative competence. The definition of “online real money game” in the Ministry of Electronics and Information Technology notification takes into its fold all games, whether of skill or chance that involve “betting”, which is in the area of the State's exclusive legislative competence under Entry 34 in the State List. By adding Rule 4A after Rule 4 in the I.T. Amendment Rules, the Central Government has sought not only to usurp for itself, but also to outsource to a Non-Governmental Body for the State's exclusive competence to legislate on “betting and gambling” under Entry 34 in the State List.

44. The judgments relied on by the petitioners to contend that the game of rummy is a game of skill date to an era where there was no internet or it was in its infancy. The Apex Court, at that relevant time, had not been in the position to apprehend the growth and scope of online gaming and its ease of access to the public. The findings of the said judgments are *de hors* the ambit of online rummy and the reliance thereof, as online rummy is a game of skill, is misplaced.

45. The discussion in *K.R. Lakshmanan* (supra) pertained to the statutory interpretation of the expressions “gaming” and “mere skills” in terms of the Madras City Police Act, 1888 and the Madras Gaming Act, 1930. The challenge in the said case was to the amendment effected to the Madras City Police Act, 1888 and the Madras Gaming Act, 1930, wherein, the definition of “gaming” was amended by removing the exception granted to Horse Racing, subject to certain conditions stipulated therein. The Apex Court held Horse Racing to be a game of skill and neither “gambling” nor “gaming”. However, Section 3,

as it was read prior to the amendment, construed Horse Racing a game of skill if (1) played on any date other than the date of running; or (2) in any place outside the enclosures of authority controlling the race. As such, the State, within its legislative competence, was empowered to regulate game of skill in Horse Racing to determine when it would amount to gambling and consequently, prohibiting it and the same has been recognised by the Apex Court in the case of *Lakshmanan* (supra).

46. The observation of this Court in the case of *Junglee Games* (supra) that “betting” on a game of skill is itself an activity, in which success depends on the skill of the player, is not universally true. Even if the game may be one of skill, the success of the person betting would depend on how accurately the result of the game can be guessed by someone who is not playing it. Even in the former case, where the player and bettor are the same person, the player may lack data about his opponents. Thus, he would be staking money on what is, from his perspective, an uncertain event, hence, he would be “betting”. The correctness of the judgment in the case of *Junglee Games* (supra) is also under challenge before the Apex Court.

47. Online rummy cannot be described as a game of skill due to various reasons, as its dealer (software) knows all the unopened cards.

48. More over, the State's interest in reasonably restricting the same is weightier in view of the following aspects:

- (a) online games are available at all times of the day to be played by an unlimited number of players from anywhere in the world;
- (b) there is no social check of any sort on addictive behaviour of an individual and the game user is totally at the mercy of the game providers who would naturally be inclined to make him play more and more;
- (c) the design elements are used to ensure that the online game user becomes psychologically dependent on the positive feeling generated upon winning even a few rounds of the game, even though they make a loss overall;
- (d) most of the money staked by the online game users gets converted as profit of the online gaming firm; and
- (e) money lending for supporting online gambling is a full-blown economic sector which fuels addiction to online gambling.

49. Reliance is placed on the judgment of the Apex Court in the case of *M.J. Sivani* (supra). The Apex Court held that “*gaming is to play any game whether of skill or chance for money or money's worth... No game can be a game of skill alone...It is not practicable to decide whether particular video game is a game of skill or a mixed skill and chance.*”

50. The judgment of the Karnataka High Court in *Gameskraft Technologies Pvt. Ltd. v. Directorate General of Goods, Services Tax*

*Intelligence (Headquarters)*<sup>17</sup> has been stayed by the Apex Court. In the said case, the Single Judge of the Karnataka High Court has held that the game of skill, whether played with stakes or without stakes is not gambling and that there is no difference between offline/physical rummy and online rummy. Many of the developed countries worldwide have prohibited online games and gambling services. There is no authoritative pronouncement to hold that rummy is a game of skill, much less of an online gaming. Incentives are offered by the petitioners involved in the online gaming business in high proportions.

51. The placement of the conjunction “and” between the expressions “betting” and “gambling” in Entry 34 in the State List is contrary to the approach directed by the Apex Court. The conjunction “and” appears several times in the Entries in the Lists in the VII Schedule. If the same consequence is attached to the placement of the conjunction “and” in all cases, it could lead to irrational results. For example, Entry 48 in the Union List enables Parliament to make laws on the subject matter of “Stock exchanges and futures markets”. Applying the same conjunction to Entry 48 in the Union List would lead to a result where no law can be made relating to stock exchanges, on which no futures are traded.

52. With respect to the game of poker, even when poker is played physically, the game has been held to be a game of chance by the Gujarat High Court in the case of *Dominance Games* (supra). Thus, so far as online poker is concerned, even the support of the judgment of the Apex Court is not available to the petitioners.

53. The Doctrine of Proportionality cannot be converted into a form of Mandamus, wherein the Judiciary instructs the Legislature about the specific type of regulation that should be adopted, no matter the cost. The measures comparable to the impugned Act have withstood the test of Proportionality, since Courts worldwide have acknowledged the risk of social and economic hardship posed by online gambling. In *Liga Portuguesa de Futebol Profissional*<sup>18</sup>, the Court of Justice for the European Union upheld Portugal's Legislation prohibiting operators which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet in Portugal. Similarly, the Supreme Court for the State of Washington in the United States in the case of *Rousso v. State*<sup>19</sup> upheld a similar prohibition on remote gambling services.

54. Online rummy and online poker are substantially different from rummy and poker played in physical space. In physical card games, there is truly random process (shuffling of cards), which can be seen and verified by the players. In online rummy/poker, there is no actual shuffling of cards and the same is simulated by the computer usually using a Random Number Generator Software (RNG). Every computer,

from the simple Babbage Engine to the modern supercomputer, is in the final analysis, a device which operates mechanically through combination of switches which turn on (binary 1) and turn off (binary 0). Computers are incapable of generating a truly random outcome, that is, the "chance" element in online rummy/poker is not comparable to the "chance" element in the physical versions of these games. In view of that, this Court would not merely decide based on the judgments, which ostensibly state that physical rummy or physical poker are games of skill and that online rummy and online poker are also games of skill.

55. The petitioners' platforms, which host online rummy and online poker are not comparable to physical clubs, where such card games are played, because:

- (a) the game of rummy is played in a club for limited hours when the club is open. The same is played by individuals above the age of eighteen. No virtual money is used as mode of payment. However, in the online world, there is no way to verify the claim that the person involved is eighteen years old and above. Though the player is duty-bound to make a self-declaration to that effect, the gaming Company has no means to verify that fact;
- (b) the club does not benefit from betting and gambling in the club while the game of rummy is being played. The club does not receive any monetary consideration in any way directly from the players who participate in the game. In virtual mode, certain percentage has to be paid from each of the players in the game of rummy and poker;
- (c) the participants in the physical world are face-to-face. Online rummy could well be played using Artificial Intelligence which would be aware of the best possible option in each game play;
- (d) the petitioners' platforms are capable of recording the manner in which each player exercises options in a certain situation and therefore, know the pattern in which the player exercises those options, which in the physical world is not to the knowledge of the club and players;
- (e) The cards in a club are distributed by players themselves in turns and in the sight of those who are present and playing the game. Such is not the case in online rummy.

56. The definition of "*online game*" under Section 2(k) of the impugned Act has unique qualities, which distinguish them from offline games. A physical card game involves a true element of chance on account of the factors such as, each player knows only his/her own cards and not other players' cards; no one, including the dealer, knows the unopened cards; no one, including the dealer, can touch the unopened cards or change the order; no one, including the dealer,



knows which card is at which place. In the absence of such factors, the “chance” element in any card game cannot be described as a true element of “chance”. The predominance or otherwise of the “skill” element in an online game cannot be measured, because the “chance” element in an online game is not a true element of “chance”. A computer, at best, is able to generate only a pseudo-random outcome, which is never a truly random outcome. Despite harping on the equivalence between real-life “true chance” and the chance generated via RNG, the petitioners or its Members do not appear to have faith in the mechanism. For this reason, several online games providers include a disclaimer as to the consequences of deploying RNG.

57. The impugned Act does not seek to overrule any binding judicial precedent or pronouncement. There is no *inter partes* finding of fact by any Court for the specific online games of rummy and poker offered by the petitioners herein that they are games of skill or that there is any impediment to the State to adopt a suitable legislation within its competence to regulate the said games. The Legislature is competent to remove the basis of a judgment. Reliance is placed on the judgment of the Apex Court in the case of *Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality*<sup>20</sup>.

58. The impugned Act is a *sui generis* legislation on online gaming and gambling and there is no authoritative legal pronouncement on the character of any online game as a “game of chance” or a “game of skill”. Hence, the old binary of “game of skill” versus “game of chance”, which was formulated in the pre-Information Technology period, needs recalibration by factoring in the critical differences between offline and online games.

59. The term “public order” in Entry 1 in the State List has wide connotation. Reliance is placed on the judgment of the Apex Court in the case of *Rev. Stainislaus v. State of Madhya Pradesh*<sup>21</sup>. The object and purpose of the impugned Act is to remedy the public disorder, which has resulted from the unchecked spread of online gaming addiction and online gambling in the State and to prevent it from spreading further. The spread of unchecked online gaming addiction and online gambling in the State was leading to (1) persons incurring unsustainable debts and committing suicides; (2) financial distress for families; (3) exploitation of persons in the State on account of the addictive design of online games and the incitement to squander money; (4) psychological and physiological effects, such as development of aggressive behaviour, poor eyesight, reduced concentration, diminished analytical thinking and decreased productivity among the youth within the State. Reading the Act as a whole, it is evident that the Legislature had the threat of public disorder

due to online gaming and gambling in mind while passing the impugned Act and that the provisions of the impugned Act have the effect of curbing the said threat. The impugned Act qualifies as a law on the subject of "public order" under Entry 1 in the State List and is *intra vires* the power conferred on the Tamil Nadu Legislature by Article 246 (3) of the Constitution of India.

60. The State does not have to wait for the threat to public order to fully manifest into widespread public disorder before invoking its legislative power under Entry 1 in the State List. The petitioners have failed to distinguish between the scope of "public order" under Entry 1 in the State List *vis-a-vis* the phrase "maintenance of public order", which appears in Entry 3 in the Concurrent List. The judgment relied on by the petitioners in the case of *Ram Manohar Lohia* (supra) relates to the interpretation of the phrase "maintenance of public order", while the judgment in the case of *Alijan Mian v. District Magistrate*<sup>22</sup> also discusses the same phrase.

61. Reliance is placed on the judgment of the Apex Court in the case of *Kartar Singh v. State of Punjab*<sup>23</sup>. It is contended that the only conclusion regarding Entry 1 in the State List, emerging from the case of *Kartar Singh* (supra), is that public disorder, targeted by a law under Entry 1 in the State List, must be of a lesser gravity having impact within the boundaries of the State and cannot extend to matters such as terrorist activities which threaten the sovereignty and integrity of the Nation.

62. The impugned Act is valid under Article 245 of the Constitution of India as long as it meets the Doctrine of Territorial Nexus test, i.e.;

- (a) the nexus between what is sought to be regulated and the territory of the State is real and not illusory; and
  - (b) the liability sought to be imposed is pertinent to that connection.
- The same has been held in the case of *State of Bombay v. R.M.D. Chamarbaugwala* (supra).

63. The Doctrine of Territorial Nexus with non-local online game providers is established based on the fact that such entity reaches out to the persons present within the State. Given that the object and purpose of the impugned Act is to protect persons within the State of Tamil Nadu from harms associated with online gambling and online gaming addiction, it stands to reason that the impugned Act only applies to non-local online game providers, whose activities are likely to lead to such harm on account of their failure to exercise due diligence or to provide geo-blocking within the territory of the State. The impugned Act has no extraterritorial effect and is not invalid on that ground.

64. Gaming disorder has been recognised and included by the World

Health Organisation (WHO) in its International Classification of Diseases (11<sup>th</sup> Revision), which is characterised by a pattern of persistent or recurrent gaming behaviour and is manifested by impaired control over other activities and continuation of gaming, despite the occurrence of negative consequences in personal, family, social, educational, occupational or other important areas of functioning. It is therefore evident that leaving online gaming unregulated poses a grave threat, particularly to young persons within the State and that online gaming addiction, recognized as a mental health concern by the World Health Organisation (WHO), is spreading in the State.

65. For this reason, the State Legislature has made a suitable law, under which the Online Gaming Authority can regulate the eligible age at which persons can play online games and the number of hours for which an online gaming service can be made available to them. Such provisions can safeguard the mental health of the people of the State as an aspect of “public health” and are therefore *intra vires* the power of the Tamil Nadu Legislature under Article 246(2) of the Constitution of India read with Entry 6 in the State List. Any activity affecting the mental health of the general public can be regulated by the State in terms of Entry 6 in the State List.

66. The impugned Act does not violate any fundamental rights of the petitioners. The petitioners cannot claim fundamental rights guaranteed by Article 19(1)(g) of the Constitution of India solely on the basis of there being an aggregation of citizens (shareholders), that is to say, the right of the citizens composing the Body. Reliance is placed on the judgments of the Apex Court in the cases of *Divl. Forest Officer v. Bishwanath Tea Co. Ltd.*<sup>24</sup> and *A.P. Dairy Development Corpn. Federation v. B. Narasimha Reddy*<sup>25</sup>. As for the Shareholders and Directors in online gaming Companies, assuming that they are citizens of India, in such case, the petitioners lack *locus* to file such petitions, because unlike the legislation under challenge in *R.C. Cooper (Banks Nationalisation) v. Union of India* (supra), the impugned Act does not deal with their rights *qua* the Shareholders and Directors and only targets the activities of the Company. The indirect consequences, if any, of the impugned Act on the values of the shares of the Shareholders pursuant to the enactment of the impugned Act would not confer *locus* on such petitions.

67. The petitioners are not in a position to agitate the putative fundamental rights of players of the game of skill to play such a game as their occupation or profession. The Court would examine the “reasonability” under Article 19(1)(g) of the Constitution of India for the restrictions placed on the “trade or business” carried on by the petitioners/its Members and not the restriction on the right of the

players to play the online games on offer as their occupation or profession. The unregulated trade or business may have a greater social and economic impact than an individual carrying on a specific profession or occupation. There is a strong public interest in regulating and in suitable cases, prohibiting trades and business to prevent wide ranging social harms which may result therefrom. The stronger restrictions may qualify as "reasonable restrictions" in the context of "trade and business" rights under Article 19(1)(g) of the Constitution of India, as compared to restrictions on professions and occupations of individuals.

68. No person or a Company can claim a fundamental right to organize a game which is a "game of chance" or organize a service for betting on games of chance. Such trades or businesses are in the nature of gambling services and qualify as *res extra commercium*. Article 19(1)(g) of the Constitution of India offers no protection for carrying on such trades or business. The petitioners/its members offer their online gaming services for a fee and derive profit in several ways from the activity of providing online gambling services. Other sources of income of the Company is the commission received from users, revenue from rummy, fantasy sports and casual games, platform fees and entry fee paid by the users in a game. Therefore, as per the decision of the Apex Court in the case of *K. Satyanarayana* (supra), the petitioners/its Members qualify as businesses in the nature of "gaming houses", whose activities can be prohibited and may warrant prosecution under criminal laws. The impugned Act seeks to do the very same.

69. It is further submitted that assuming without conceding that the petitioners are entitled to any fundamental rights under Article 19 of the Constitution, the impugned Act qualifies as a reasonable and proportionate restriction on the petitioners' activities under Article 19 of the Constitution of India. The impugned Act satisfies all four prongs of the test of proportionality outlined by the Apex Court in the case of *Modern Dental College and Research Centre*<sup>26</sup>.

70. Artificial Intelligence and bots are used in online games in several scenarios. Detecting the use of AI and AI-assisted bots as part of online gaming services is impossible by merely examining the functioning of the online game program itself. Thus, the regulation of online games for ensuring fair play and equal chance of betting poses challenges of a different nature and scope as compared to regulating offline games. It is on this basis that the Tamil Nadu Legislature, in its wisdom, has taken the most social and economic step of prohibiting online gambling services altogether.

71. The impugned Act pursues the legitimate goal of countering ruinous addiction to online gambling and of protecting vulnerable and under age persons who are at great risk of harm to their finances and

mental health on account of the uninterrupted and unrestricted access to gambling platforms. Prohibition on online gambling services is a suitable measure for achieving this goal. No measure, other than prohibition of online gambling services would be as effective for achieving the legitimate goal, as prescribed herein. Regulating any entity that operates over the internet is a complex matter and would involve disproportionate expenditure of finances and manpower, which is not feasible for the State of Tamil Nadu.

72. We have considered the submissions canvassed by learned counsel for the parties.

73. The petitioners are challenging the Act of 2022, namely the Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Act, 2022. The impugned Act is enacted in the backdrop of the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 (hereinafter referred to as "the Amendment Act of 2021"), which had sought to ban online games such as "rummy" and "poker" played with stakes or money. The said Amendment Act of 2021 was struck down in its entirety by this Court and was declared as *ultra vires* the Constitution of India under the detailed judgment dated 03.08.2021 in the case of *Junglee Games* (supra).

74. After the aforesaid judgment was delivered by this Court, thereby striking down the Amendment Act of 2021, the State Government appointed a five Member Committee, headed by a retired Judge of this Court for advising the Government for enacting a fresh legislation on online games. The State Government purportedly, on the basis of the recommendations made by the Committee, promulgated the Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Ordinance, 2022 on 01.10.2022. The Ordinance was challenged before this Court in W.P. No. 29911 of 2022, but as there was no date notified for operation of the Ordinance, the petitioners, along with the other persons, were permitted to withdraw the petition on 16.11.2022 to represent their cases as and when the date is notified.

75. The Ordinance was subsequently introduced as a Bill on 19.10.2022 and was passed by the Legislative Assembly on the same day. The Bill was returned by the Governor of Tamil Nadu over certain concerns regarding the similarity between the Bill and the Amendment Act of 2021, which was struck down by this Court. The Bill was re-enacted by the Legislative Assembly without any changes on 23.03.2023, which was assented by the Governor of Tamil Nadu on 07.04.2023. The Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Act, 2022 was published in the Tamil Nadu Government Gazette Extraordinary and the notification, bringing the impugned Act into force, was issued on 21.04.2023.

76. Section 2(i) of the impugned Act defines “online gambling” as online wagering or betting and includes playing of any online game of chance for money or other stakes in any manner. The said definition is further explained as wagering or betting shall be deemed to comprise the collection or soliciting of bets, the receipt or distribution of winnings or prizes, in money or otherwise, in respect of any wager or bet, or any act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution.

77. Section 2(l) of the impugned Act defines “online game of chance” as hereunder:

*“2(l) “online game of chance” includes any online game which, -*

*(i) involves both an element of chance and an element of skill and the element of chance dominates over the element of skill; or*

*(ii) involves an element of chance that can be eliminated only by superlative skill; or*

*(iii) is a game that is presented as involving an element of chance; or*

*(iv) involves cards, dice, wheel or such other device, which works on random outcome or event generator.”*

78. The Online Gaming Authority is established under Section 3 and the functions of the said Authority are detailed under Section 4, whereunder, in Section 4(1)(c), one of the functions of the Authority is to identify online games of chance and recommend the same to the Government, for inclusion in the Schedule.

79. Section 5 of the Act of 2022 empowers the Authority, with the previous approval of the Government, to make regulations consistent with the provisions of the Act or the Rules. Sub-Section (2) of Section 5 of the Act of 2022 states that regulation may provide for (a) time limit, monetary limit, age restriction or such other restrictions in regard to playing of online games; and (b) procedure to regulate its own functions.

80. Section 7 of the Act of 2022 states that *(1) Online gambling is prohibited; (2) Playing of online games of chance specified in the Schedule with money or other stakes is prohibited.* Sub-Section (3) of Section 7 of the Act of 2022 provides that no online games provider shall provide online gambling service or allow playing of any online game of chance, specified in the Schedule, with money or other stakes or playing of any other online game in contravention of the regulations in any form.

81. Section 10 of the Act of 2022 prohibits local online games provider from providing any service for the conduct of any online game, except in accordance with the certificate of registration duly obtained from the Authority.

82. Section 14 of the Act of 2022 prohibits non-local online games providers from providing any online gambling service so as to allow playing of any online game of chance specified in the Schedule with money or other stakes or allow playing of any other online game contrary to the regulations in this State.

83. Section 23 of the Act of 2022 provides that any online game specified in the Schedule shall be presumed to be an online game of chance. Sub-Section (2) of Section 23 of the Act of 2022 empowers the Government, by notification, to omit or add any online game in the Schedule, on the recommendation of the Authority and upon issuance of such notification, the Schedule shall be deemed to be amended accordingly.

84. On the day the impugned Act was enacted, (i) rummy and (ii) poker were included in the Schedule of the impugned Act as online games of chance. The same is the bone of contention in the present matter.

85. It is true that whenever there is a challenge to the constitutional validity of an Act enacted by the Legislature or provisions thereto, one has to keep in mind that presumption is in favour of constitutional validity of law enacted by the Legislature and the petitioners will have to demonstrate transgression of the constitutional provisions and the mandate. It is well settled that the legislative enactment can be challenged on two grounds:

- (i) That the Legislature does not possess the competence to make the said law;
- (ii) The same is arbitrary, irrational and that it takes away or abridges any of the Fundamental Rights enumerated in Part III of the Constitution of India or any other constitutional provisions.

86. It is on the touchstone of the aforesaid principles, the matter will have to be decided.

87. The essence of the impugned Act has been clearly encapsulated in its Preamble. The impugned Act is based on the pretext of achieving public welfare and to maintain public health. The impugned Act is enacted under the premise that the issues of online gaming and gambling cannot be dealt with by the old binary of "game of chance" versus "game of skill" and a new conceptual framework is needed, which incorporates the understanding of how Information Technology operates at the basic level, the critical difference between physical and online in general and also the physical and online versions of the games.

88. The intention and object of promulgating the impugned legislation, no doubt, appears to be laudable and bonafide. However, mere intention and bonafides would not be sufficient to uphold the



legislation. The legislation has to withstand the test of legislative competence and should be free from manifest arbitrariness. The same will also have to be viewed on the premise of the rights of the parties being trampled or otherwise.

89. The State is empowered to legislate in respect of the Entries in List II of the VII Schedule. Entry 34 of the State List includes "betting and gambling". The State certainly has the authority to legislate in respect of betting and gambling. This Entry 34 of the State List viz, "betting and gambling" was the subject matter of consideration before the Apex Court in catena of cases.

90. The Apex Court in the case of *The State of Bombay v. R.M.D. Chamarbaugwala* (supra) observed and held that "*if even a scintilla of skill was required for success the competition could not be regarded as of a gambling nature*".

91. In the case of *R.M.D. Chamarbaugwala v. Union of India* (supra), the Apex Court held that "*the competitions in which success depends to a substantial extent on skill and competitions in which it does not so depend, form two distinct and separate categories. The difference between the two classes of competitions is as clear-cut as that between commercial and wagering contracts*". In that way it was held that competitions in which success depends on substantial extent of skill are commercial in nature and not wagering.

92. In the case of *Andhra Pradesh v. K. Satyanarayana* (supra), the Apex Court has conclusively held that "*the game of rummy is not a game entirely of chance like the "three-card" game mentioned in the Madras case. The "three-card" game which goes under different names such as "flush", "brag" etc. is a game of pure chance. Rummy on the other hand requires certain amount of skill because the fall of the cards has to be memorised and the building up of rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of rummy is a game of entire chance. It is mainly and preponderantly a game of skill*".

93. The Apex Court in the case of *K.R. Lakshmanan v. State of Tamil Nadu* (supra), has elaborately dealt with the concept of gaming. The Apex Court in the said case had observed that gaming is an act or practice of gambling on a game of chance. It is the game of chance, where chance is the controlling factor. Gambling would mean wagering or betting on games of chance. It would not include games of skill. It further held that the games of skill, although the element of chance necessarily cannot be entirely eliminated, is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player. Golf, chess and even rummy are considered to be games of skill. In the said case, the club was charging 5% commission, however, was not earning an income from

the betting money. The same was held to be legal by the Apex Court.

94. The Division Bench of this Court in the case of *Junglee Games India Private Limited v. State of Tamil Nadu* (supra) also held that the games of rummy and poker are games of skill. Even in the 276<sup>th</sup> report of the Law Commission, poker is referred to as a game of skill. The learned Single Judge of the Gujarat High Court, in the case of *Dominance Games Pvt. Ltd.* (supra), held that poker is a game of chance. It relied upon the judgment of the Court of United States, District Court, New York in case of *United States of America v. Lawrence Dicristina* (supra). In the said case, the finding that poker is a game of skill was undisturbed by the Appellate Court. The said aspect has been considered by the Division Bench of this Court in the case of *Junglee Games* (supra). In view of the judgment of the Division Bench of this Court in the case of *Junglee Games* (supra), the judgment delivered by the learned Single Judge of the Gujarat High Court need not be relied.

95. Similarly, the said judgments have been followed by the High Courts of Karnataka, Andhra Pradesh, Kerala and this Court in the cases of *B. Mahamood v. State*<sup>27</sup>; *Muthu v. State*<sup>28</sup>; *All India Gaming Federation v. State of Karnataka* (supra); *Head Digital Works Private Limited v. State of Kerala* (supra); *Executive Club v. State of Andhra Pradesh*<sup>29</sup>; *Patamata Cultural and Recreation Society v. Commissioner of Police*<sup>30</sup>; *Friends Cultural & Sports Society Club, Hyderabad v. Prl. Secretary Home Depts., Hyderabad* in W.P. No. 30597 of 2014 and W.P. Nos. 22428 & 121 of 2015; *G.V.R. Family Club v. State of Andhra Pradesh* in W.P. Nos. 24533, 25043, 25053, 25395 and 25404 of 2011; *D. Krishna Kumar v. State of AP*<sup>31</sup>; *Twin Cities Cinema Cultural Centre v. Comm. of Police*<sup>32</sup>; and *Fulsingh Naik Krida Mandir v. The State of Maharastra*<sup>33</sup>, where it is held that rummy is a game of skill.

96. The first legislation, the Public Gaming Act was brought in the year 1867, which is still being followed in the Act of 2022. According to the Act of 1867, all forms of gambling and betting activities, except horse racing, are illegal. However, this Act only deals with physical betting. The law is silent on online betting. The Act of 1867 is still in existence after independence, as it was enforced under Article 372 of the Constitution of India. The Constitution of India gives power to the State to regulate gambling as it falls under List II Entry 34 of the VII Schedule of the Constitution of India. However, if the State fails to regulate, the Act of 1867 will continue to govern. Few States have made certain amendments to the Act of 1867 according to the requirement of the State. Gambling is generally prohibited in all States except Sikkim, Goa and Daman.

97. According to Section 12 of the Act of 1867, any game in which

skill is the dominant factor, it will not be considered gambling, while games of chance would be considered as gambling. The Apex Court and High Courts in various decisions have given interpretation of games of chance and games of skill.

98. Wagering, gambling and betting have often been confused to be synonymous. This Court, in the case of *Public Prosecutor v. Veraj Lal Sheth*<sup>34</sup>, explained the distinction as follows: “*The principal distinction between gaming and betting or wagering is thus immediately apparent; in gaming the stake is laid by the players upon a game, the result of which may depend to some extent upon the skill of the players, but in a bet or wager, the winning or losing of stake depends solely upon the happening of an uncertain event*”. In a game of skill, although the element of chance necessarily cannot be entirely eliminated (specially the element of randomness in shuffling and dealing of cards), success predominately depends on superior knowledge, training, attention and experience of the player.

99. The Apex Court and the High Courts have consistently held that rummy and poker are games of skill, however, at that relevant period, the game of rummy was played only physically (offline) and what is sought to be banned is only the online games of rummy and poker. In view of the authoritative pronouncements of the Apex Court that rummy is a game of skill and this Court also has held that rummy and poker are games of skill, heavy burden is upon the State to distinguish as to how online games of rummy and poker would partake the character of games of chance and not skill.

100. The State, under the Act of 2022, does not ban physical games of rummy and poker. The question would be whether the games of rummy and poker, played physically and construed as games of skill, would not remain games of skill if played online. To substantiate the contention that the online games of rummy and poker would not be brought within the purview of games of skill, the State has relied upon the following factors:

- i. Dealer (software) knows all the cards at all the times, including which card is going to be dealt next;
- ii. Dealer (software) knows all the cards in hands of each player;
- iii. Dealer (software) knows all the unopened cards;
- iv. Dealer (software) can change the unopened cards;
- v. The players are not in a position to prevent the dealer (software) from breaching the rules of the game;
- vi. The players cannot see each other and no player can be certain about the identity of other player or whether another player is a human or a bot.

101. To counter the same, the petitioners have stated that they

have adopted the highest standard of security measures on their platforms for providing its users/players a secured platform and a healthy environment. It is stated that the players follow the “*Code of Conduct for Online Rummy Operators*”, issued by the E-Gaming Federation. According to them, the following are the measures adopted by the petitioners on their platforms:

- i. The players deposits are encrypted with 128-bit SSL;
- ii. No information about the cards, which are dealt, are shared with any party and only a player has information about the cards dealt to him or her;
- iii. Information related to users are stored in a secure environment and is not shared with any third-party, except for the purpose of provision of services by the Platform. The Company enters into Non-Disclosure Agreement with all such third parties;
- iv. The Petitioner has a dedicated customer support team ensuring prompt response to customer issues, if found and reported. Games are monitored on a regular basis to detect any violation of the terms of the Portal by players;
- v. Allocation of tables is random, and no table is prefixed for any game. Players, therefore, have no control over selection of players on any table;
- vi. Players logged in from the same IP address are not allocated seats on the same table;
- vii. Information about the playing cards is always encrypted, thereby preventing any third party from viewing the same;
- viii. There is no intervention of the petitioners in the conduct of games between players. Anti-fraud algorithms are applied after conclusion of games to check if players tried to defraud anyone after the completion of games and appropriate action is taken as per the Terms of Service of the Portal, if any such case is found;
- ix. As per the Code of Conduct, the Players can also choose ‘Responsible Play Settings’ to self-regulate the option to voluntarily set limits on their game of play including monetary limits and time limits;
- x. Constant improvements are made in the Platform to ensure fair and secure gameplay by deployment of the latest software and technical solutions;
- xi. No bots or Artificial Intelligence is used while playing the online game of rummy. Moreover, there is no empirical data or proof to substantiate the contention of the State. The petitioners rely upon the certificate issued by an independent globally renowned IT Audit Agency (iTech Labs, Australia), certifying that there is no usage of bots in the game play;

- xii. In the game of online rummy, the card decks are properly shuffled, the sequence of cards dealt by each player on a game table is completely random and does not follow any observable/deducible pattern nor is the same controlled or known to the petitioners or any of its employees and does not work to the advantage of any single player on the table;
- xiii. The RNG Software ensures that there is no bias or tampering in the way cards are distributed to users and that all users start the game on an equal footing. The petitioners, nor their employees can neither find out nor predict the cards that are to be distributed.

102. The contention of the State that the petitioners may use bots would be without any basis. There is nothing on record to substantiate the contention of the State that the dealer (software) knows all the cards all the time, including which card is going to be dealt with, or that the dealer (software) knows all the cards in the hands of each player or that the dealer (software) can change the unopened cards. The said propositions, on behalf of the State, are merely on surmise. We can understand that the game is played online and the State could not gather authentic evidences about bots being used or that the software knows all the cards in the hands of each player, so also the unopened cards or the software could change the unopened cards. In the absence thereof, it will be too far fetched only on the basis of the assumptions by the State to conclude that the game of rummy, played online, partakes the character of game of chance and is distinctly different than the one played offline.

103. We are now transcending into the era of digitization world and entertainment. People, instead of playing in clubs, are now playing online. With the rise of internet connectivity and technological advancements, we see a spurt in online games. Many online games are in vogue. The games of rummy and poker, which are considered as games of skill are also now sought to be played online. In online games of rummy and poker also, the same brain activity would be involved as required for offline games of rummy and poker. Online fantasy games are now held to be games of skill and not games of chance by the High Court of Punjab and Haryana in the case of *Varun Gumber v. Union Territory of Chandigarh*<sup>35</sup>. The High Court of Rajasthan, in the case of *Chandresh Sankhla v. State of Rajasthan*<sup>36</sup> observed that in Dream 11, there is no element of betting or gambling as it is a game of skill. The High Court of Bombay has also reiterated the same in the case of *Gurdeep Singh Sachar v. Union of India*<sup>37</sup>.

104. The State, in the impugned Act, has already included the games of rummy and poker to be online games of chance merely on

presumption. The same cannot be protected. The same would be contrary to the judgments of the Apex Court and of this Court, discussed *supra*. In view of that, it will have to be held that the inclusion of the games, rummy and poker, in the Schedule of the Act is erroneous, does not stand to reason and the said Schedule deserves to be set aside. The corruption or mischief in a game may not define the game. Of course, in an isolated case, if it is noticed by the State that the petitioners or any other online games servers, online games providers are using bots or have indulged in any illegal activity, it can take action against it. However, to dub online games of rummy and poker as games of chance would be against the dictum of the Apex Court and the various High Courts.

105. The Central Government, in exercise of its powers conferred by Sub-Section (1) and Clauses (z) and (zg) of Sub-Section (2) of Section 87 of the Information Technology Act, 2000 enacted the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023. It came into effect from 6<sup>th</sup> April, 2023.

106. The IT Amendment Rules, 2023 defines "online real money game" as "*an online game where a user makes a deposit in cash or kind with the expectation of earning winnings on that deposit*". "Online gaming intermediary" means "*any intermediary that enables the users of its computer resource to access one or more online games*".

107. Under Rule 4A of the IT Amendment Rules, 2023, the Ministry may, by a notification in the Official Gazette, designate as many Online Gaming Self-regulatory Bodies as it may consider necessary for the purpose of verifying an online real money game as a permissible online real money game under the Rules.

108. The said Rule provides for an Online Gaming Intermediary Body comprising persons from varied fields, such as, an individual having practical experience in the Online Gaming Industry, an Educationist, an expert in the field of Psychology or Mental Health or such other relevant field, an individual having special knowledge of/or practical experience in the field of Information and Communications Technology, an individual who is or has been a Member or Officer of an Organisation dealing with the protection of Child Rights and so on.

109. Under Rule 4A(8) of the IT Amendment Rules, 2023, the Online Gaming Self-regulatory Body shall prominently publish on its website, mobile based application or both, as the case may be, a framework for verifying an online real money game, which among other things, includes (a) the measures to ensure that such online real money game is not against the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States and public order; (b) the safeguards against user harm, including self-harm and

psychological harm; (c) the measures to safeguard children, including measures for parental or access control and classifying online games through age-relating mechanism, based on the nature and type of content; and (d) the measures to safeguard users against the risk of gaming addiction, financial loss and financial fraud, including repeated warning messages at higher frequency beyond a reasonable duration for a gaming session and provision to enable a user to exclude himself upon user-defined limits being reached for time or money spent.

110. One cannot divorce “betting” from “gambling”. The contention of Mr. Kapil Sibal, learned Senior Counsel for the State is that in the case of *K. Satyanarayana* (supra), the Apex Court held that “*if there is evidence of gambling in some other way or that the owner of the house or the club is making a profit or gain from the game of rummy or any other game played for stakes, the offence may be brought home*”. In the said case, the club was charging a sitting fee i.e., 50 Paise per person. The Apex Court further observed that “*if it had been proved that 5 points per game were charged, that might have been considered as an illegal charge*”.

111. In the present case, the platform provider or the game provider is charging a fixed sum and is not claiming shares in the profits. If the game providers have been claiming shares in the profits, then that would be a different situation altogether, but here, a fixed percentage of sum is charged.

112. In the case of *K.R. Lakshmanan* (supra), it has been held by the Apex Court that unless both “betting” and “gambling” are involved, the State Legislature has no legislative competence to make law.

113. The State has relied upon its power to legislate in view of Entry 1 and Entry 6 of the State List. Entry 1 of the State List deals with public order and Entry 6 of the State List deals with public health, sanitation, hospitals and dispensaries.

114. No doubt, the State would certainly be concerned with public health, which is one of the duties of the State. However, what has been done by the State and the Committee, submitting the report, is only interviewing school teachers. Moreover, the school teachers would be supervising students below 18 years of age. Students below the age of 18 years are prohibited and not permitted to play online games in the instant case.

115. It is contended that before enacting the impugned legislation, a Committee was constituted under the Chairmanship of a retired High Court Judge and the Committee has given a report. The report emphasises about the survey conducted among more than two lakh teachers in the School Education Department to study the effects of online games on School students. More than 74% of the teachers responded that the concentration of students is impacted, 67% of them



responded that they noticed eye defects, more than 74% of the teachers stated that they noticed decrease in Intelligent Quotient, writing skills and creativity of students, more than 77% said they noticed increase of anger in students and more than 72% said they have noticed indiscipline among students.

116. It is to be considered that the online games, in the instant case, are not available for persons/children below the age of 18 years. Online games can be played only by the persons who are 18 years and above i.e., major and not School children. The apprehension raised by the learned Senior Counsel for the State was that there would be no methodology to verify the age of the person playing. The petitioners responded to it by suggesting that a person, before he enrolls to play, is required to submit his Aadhaar Card, photograph, KYC and other precautionary measures are taken to confirm that the person playing is 18 years old or more.

117. Another apprehension of the respondent was that the games are played 24 hours, thereby endangering the public and domestic health. As observed above, the concern expressed by the State about public health of its citizens is but natural. The State has to take care of the public health of its citizens. Section 5 of the impugned Act authorises the authority, by notification and with the previous approval of the Government, to make regulations to carry out the provisions of the Act namely, time limit, monetary limit, age restriction or such other restrictions in regard to playing of online games. The State certainly has the power to regulate online games of skill. It can control and regulate the games of skill. The State can provide for the time limit, that the game may not be played after a particular time and it would have the necessary infrastructure and expertise to take all the measures that the games would not be played within the State after a particular time. It can also regulate the age restriction and other aspects. The same would be within the competence of the State.

118. The power to regulate games of skill lies with the State Legislature under Entry 26, List II of the Indian Constitution, viz., "Trade and Commerce". If that is the case, then the State certainly will have the right to regulate games, as is contemplated in Chapters IV and V of the impugned Act. Though the aspect of public welfare ought to be considered while legislating a particular subject matter, it is necessary to carve out the pragmatic regulatory measures, rather than imposing blanket ban.

119. In the case of *R.M.D. Chamarbaugwala v. Union of India* (supra), the Apex Court had observed that "*while controlling and regulating would be requisite in the case of gambling, mere regulation would have been sufficient as regards competitions involving skill*". The Preamble of the Act is also suggestive of the same. The Preamble of the

Act states that "*the Act to prohibit online gambling and to regulate online games in the State of Tamil Nadu*". Certainly, online gambling can be prohibited by the State. The State has ample power to enact a legislation to prohibit online gambling and it has also the power to regulate online games of skill in the State of Tamil Nadu. In stead of resorting to regulating online games of skill, in this case, rummy and poker, the State has simply prohibited the said games. The same was in excess of its legislative competence.

120. Heavy reliance is placed by the State on the judgment of the Apex Court in the case of *M.J. Sivani* (supra). In the said case, the Apex Court was considering the legislation enacted for running of video game parlours and not playing of video games. In the said case, the Apex Court held that certain video games are falling within the class of games of chance and not in the games of skill. The said conclusion was arrived at after considering the report of the Committee of Senior Police Officials, demonstrating about tampering of the video game machines and thereby, were brought within the purview of games of chance. However, in the said case, law existed regulating gaming activity and the same was violated. In the present case, as observed *supra*, the respondent State could not even remotely demonstrate tampering of software or any such device that would take away the games of rummy or poker from the contour of games of skill. Moreover, the three Judges Bench of the Apex Court in the case of *Dr. K.R. Lakshmanan* (supra) held rummy to be a game of skill.

121. Another apprehension raised by the State is of public order. Public order in the State List would imply activities that would jeopardize and affect public at large. The Apex Court in the case of *Ram Manohar Lohia* (supra) observed that "*Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are....*". There is no evidence in the instant case that public order is disturbed.

122. In the light of the aforesaid discussion, we hold that the impugned Act, in its entirety, need not be held to be *ultra vires*. It is held that the State is competent to legislate to the extent of prohibiting

online gambling, i.e., games of chance, at the same time, it has got the authority to regulate online games of skill. The definition of “online gambling” under Section 2(i) of the impugned Act shall be read as restricted to “games of chance” and not games involving skill. Section 2 (l)(iv) of the impugned Act would not be entirely valid. The games of rummy and poker are games of card, but are games of skill. Section 2 (l)(iv) is being read down, to mean, it excludes games of skill viz., rummy and poker.

123. Having held that the State has got the authority to legislate on online games of chance, as gambling would be betting on the games of chance, it is not necessary to declare Sections 7, 8 and 9 of the impugned Act as *ultra vires*. As discussed above, it has been authoritatively held by the Apex Court in a catena of judgments, so also this Court that the games of rummy and poker are games of skill. The State has miserably failed to demonstrate that online games of rummy and poker are different and distinct from offline games of rummy and poker. The apprehension expressed by the State that bots may be used or the dealer (software) would know the cards are without any substantive material. In view thereof, the Schedule under Section 23, incorporating rummy and poker as games of chance, is set aside.

124. The State may make regulations as contemplated under Section 5 of the impugned Act, thereby providing reasonable regulations for the time limit, age restriction or such other restrictions in regard to playing of online games.

125. Section 10 of the impugned Act may not be declared as *ultra vires* as it will be necessary for the State to know about the online games providers operating within its State and that they are not indulging in any games of chance. If the State comes across the usage of bots or any dubious methods in the play of games of rummy and poker, it can take action and for that purpose also it will be necessary to uphold Section 10 of the impugned Act. The State may frame regulations as contemplated under Section 5 of the impugned Act.

126. In the light of the aforesaid, the writ petitions, as such, stand partly allowed. The prayer to declare the entire impugned Act of 2022 as *ultra vires* is negated. The Schedule of the impugned Act, including the games of rummy and poker, are set aside. Sections 2(i) and 2(l)(iv) of the impugned Act shall be read as restricted to games of chance and not games involving skill, viz., rummy and poker. There will be no order as to costs. Consequently, W.M.P. Nos. 12944, 13271, 13272, 13398, 13399, 13400, 13403, 1405, 13406, 14202 and 1204 of 2023 are closed. W.M.P. Nos. 13269, 13397, 13402 and 14201 of 2023, filed to permit the petitioners to file a single writ petition are allowed and disposed of, as they have paid separate sets of court fee.

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<sup>1</sup> 2021 SCC OnLine Mad 2762

<sup>2</sup> (1996) 2 SCC 226

<sup>3</sup> AIR 1957 SC 699

<sup>4</sup> AIR 1957 SC 628

<sup>5</sup> 2022 SCC OnLine Kar 435

<sup>6</sup> (1995) 6 SCC 289

<sup>7</sup> AIR 1968 SC 825

<sup>8</sup> 2012 USA LEXIS 118037

<sup>9</sup> *Civil Appeal No. 476 of 2017*

<sup>10</sup> 2017 SCC OnLine Guj 1838

<sup>11</sup> 2021 SCC OnLine Ker 3592

<sup>12</sup> (1966) 1 SCR 709

<sup>13</sup> ((1970) 1 SCC 248)

<sup>14</sup> (1972) 2 SCC 788

<sup>15</sup> [(1982) 1 SCC 125]

<sup>16</sup> (1989) 3 SCC 698

<sup>17</sup> (2023) 98 GST 93 (Karnataka)

<sup>18</sup> (*Case C-42/07*)

<sup>19</sup> 170 Wn.2d 70; 239 P.3d 1084

<sup>20</sup> (1969) 2 SCC 283

<sup>21</sup> (1977) 1 SCC 677

<sup>22</sup> (1983) 4 SCC 301

<sup>23</sup> (1994) 3 SCC 569

<sup>24</sup> (1981) 3 SCC 238

<sup>25</sup> (2011) 9 SCC 286

<sup>26</sup> (2016) 7 SCC 353

<sup>27</sup> 2019 SCC OnLine Mad 10303

<sup>28</sup> 2019 SCC OnLine Mad 25365

<sup>29</sup> (1998) 5 ALD 126

<sup>30</sup> (2005) 1 ALD 772

<sup>31</sup> (2002) 5 ALT 806

<sup>32</sup> (2002) 2 ALD (Cri) 22 (Division Bench)

<sup>33</sup> 2018 ALLMR (Cri) 1013

<sup>34</sup> AIR 1945 Mad 164

<sup>35</sup> 2017 Cri LJ 3827

<sup>36</sup> 2020 SCC OnLine Raj 264

<sup>37</sup> (2019) 30 GSTL 441

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